

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

{ Grievant }  
Grievant

Record of Proceeding  
FSGB No. 2007-037

And

Date: June 2, 2008

Department of State,  
Department

**DECISION**

EXCISION

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For the Foreign Service Grievance Board:

Presiding Member:

Garvin Lee Oliver

Board Members:

Lois E. Hartman  
Jeanne L. Schulz

Special Assistant:

Linda B. Lee

Representative for the Grievant:

Pro Se

Representative for the Department:

Joanne M. Lishman  
Director  
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

## **CASE SUMMARY**

**HELD:** Grievant established harmful procedural errors in that his entire application package should have been considered in setting his initial starting salary, and he was not properly advised of the availability of a salary review after becoming employed. The case was remanded to the Department to conduct a new qualifications evaluation and salary review and for its burden to establish, by a preponderance of the evidence, that the agency would have taken the same action had the procedural errors not occurred.

## **OVERVIEW**

Grievant, a Facilities Maintenance Manager in the Foreign Service with the Department of State, appealed the agency's denial of his grievance concerning his initial starting salary. His salary was set at FP-04, Step 9. He claims his initial starting salary should have been set at FP-04, Step 14, based on his relevant prior work experience set forth not only in his Application for Employment (DS 50) but also his supplemental qualifications statement (SQS) and his personal history statement which should have been considered. He was advised in the confirmation of appointment letter that any salary review requests must be received within 10 calendar days and that salaries will not be reconsidered after entry on duty. He did not learn until later that Department (Bureau of Human Resources) Standard Operating Procedure 115A (SOP 115A) provided that, under certain circumstances, a review may be permitted up to 30 days after entry on duty.

The Agency claimed that grievant's entry-level grade and step was determined based on the qualifications and experience that he included in his Application Form 1950 and there is no requirement that SQS forms be used in such determinations. Based on an analysis of grievant's Form DS-50 only, the agency determined that {Grievant} actually received a higher step than warranted. As no reduction in salary will take place, grievant was not harmed by the initial misevaluation.

Based on the Foreign Service Act, implementing regulations, and published guidelines, the Board held that the Department abused its broad discretion in setting grievant's entry-level salary. A reasonable applicant would fairly conclude from the announcement that the initial salary grade/step would be determined by an evaluation of the entire package he was required to submit, including the SQS. SOP 115A also does not limit the evaluation to the Application Form DS-50.

The Board also sustained grievant's argument that he was not correctly advised of the salary review options. Although grievant was notified that "salary review requests must be received within 10 calendar days from the date of this letter" and that "salaries will not be reconsidered once you have entered on duty," SOP 115A provides that, under certain circumstances, a review may be permitted up to 30 days after entry on duty.

The Board found the procedural errors to be of such a nature that they may have been a harmful substantial factor in the agency action with respect to the grievant. Therefore, the case was remanded to the Department to consider grievant's Application DS Form 50,

SQS, and personal history statement in conducting a new qualifications evaluation and salary review and for its burden to establish, by a preponderance of the evidence, that the agency would have taken the same action had the procedural errors not occurred.

## **DECISION**

### **I. THE GRIEVANCE**

{Grievant} , grievant, a Facilities Maintenance Manager in the Foreign Service with the Department of State (Department, agency) is appealing the agency's denial of his grievance concerning his initial starting salary. When he joined the Foreign Service in March 2007, his salary was set at FP-04, Step 9. He claims his initial starting salary should have been set at FP-04, Step 14, based on his relevant prior work experience. For remedies he requests the following:

1. Reassess entry grade to FP-04, Step 14;
2. Back-date this reassessment to entry date of March 5, 2007, and retroactively apply pay and all other appropriate benefits;
3. Other remedies deemed appropriate.

### **II. BACKGROUND**

In 2006, grievant filed an application for the position of Foreign Service Facilities Maintenance Specialist, Vacancy Announcement FMS 99-1. The announcement provided that initial salaries for new employees ranged from the first through the fourteenth step of the FP-04 level "depending on such factors as education received from an accredited institution of higher education and specialized experience." The announcement stated that "[s]pecialized experience must demonstrate the applicant possesses in-depth knowledge, skills and abilities to perform effectively." It listed the desirable skills/capabilities an applicant should address in the supplemental qualifications statement (SQS) and, among other things, requested that the "role, dates, and problem solved or objective met" be described. The announcement stated that the information

given in the SQS “may be used to structure your oral examination/interview should you be invited to one, and is an important factor in the competitive evaluation of applicants.” Applicants were required to submit, among other things, an Application for Federal Employment (DS-1950), a completed SQS, and a narrative autobiography.

Grievant filed the required documents. His DS-1950 listed jobs from October 1995 to March 2006. His four page SQS described knowledge, skills, and abilities obtained in five specific periods other than the 1995-2006 period, namely 1980, 1982-1984, 1984-1987, 1990-1993, and 1993-1995. His personal history statement explained that he had been in the Navy since 1976 and that “I have 30 years experience doing exactly the type of work that you are looking for as a Facilities Management Specialist.”

By confirmation letter of January 30, 2007, grievant received an offer for the position of Foreign Service Facilities Maintenance Specialist Career Candidate. The letter stated:

Your entry-level grade and step are FP-4, Step 9, with a gross annual salary of \$62,719. In determining your entry-level grade and step, the Registrar’s Office reviewed the qualifications and experience that you included in your Application for Employment (form 1950).

...

If you have updated information on your work experience, or if you question the original determination, you must submit your request for a salary review. Any salary review must be requested prior to entering on duty. Salary review requests must be received within 10 calendar days from the date of this letter along with new supporting documentation. Please note that salaries will not be reconsidered once you have entered on duty.

After entering on duty on March 4, 2007, and while attending orientation, grievant learned that several other new appointees had been hired at higher salary steps although their prior job related experience appeared to be less than his experience. He

contacted AFSA about his initial salary on March 23 and filed a grievance on April 17, requesting that his initial salary be set at the FP 04, Step 14 level. He attached a resume setting forth additional details of his work experience from 1976. The agency denied his grievance on July 13. The agency determined that grievant actually received a higher step than warranted, but no reduction in salary would take place.

{Grievant} appealed the agency decision to this Board on September 10, 2007.

On October 16, the agency responded to the grievance appeal. On October 25 and January 8, 2008, the Board requested that the agency provide additional documents and information. Grievant responded to the agency's submissions and both parties then submitted additional comments. The Record of Proceedings was closed on November 20, 2007, was reopened on January 8, 2008, and was closed again on February 11, 2008.

### **III. POSITIONS OF THE PARTIES**

#### **The Grievant**

Grievant contends that the Department's procedures for notifying candidates of their options are flawed. The confirmation letter provided no information on how the agency reached its decision on the entry step, nor what might constitute grounds for review. {Grievant} states he received the offer letter on February 2, 2007, with a report to duty date of March 5, 2007. During that month he had to sell his house, pack out, and locate accommodations in the Washington, D. C. area for himself and his family. Although the employment offer provided for a salary review request which had to be received within 10 days from the date of the offer, he states that he had no information on which to base a request for a salary review. As far as he was concerned, the agency had all the information required to make a correct judgment. He concedes that his DS-1950

did not set forth his full resume but he included the required SQS with knowledge, skills and abilities by dates which were an integral part of the application process. He contends that the SQS and his personal history statement should have been considered in setting his salary. A reasonable person would assume, as he did, that all of the material he was required to submit would be considered. The agency documents did not state that only information included on the DS Form 1550 would be considered.

He did not have access to SOP 115A and was unaware until it was cited in the agency denial of his grievance that, under certain circumstances, a review may be permitted up to 30 days after entry on duty.

Grievant points out that the resume attached to his grievance, setting forth additional details of his work as a Construction Engineer in the U.S. Navy (1978-2006) demonstrates that he performed all of the requirements of the position for which he applied. Grievant claims that his 21 years of specialized experience clearly exceed the minimum seven years required for the FP-04, Step 1 level and, setting aside his extra educational and training qualifications, his years of specialized experience would qualify him at the FP-04, Step 14 level. This would amount to an increase of over \$12,000 a year.

Grievant states that the agency's position that it had even set his salary too high at FP-04, Step 9, also calls into question the entire process and requires a readjustment of his entry salary to FP-04, Step 14.

## **The Agency**

The Agency asserts that grievant's position that he was given a flawed notification is baseless. Grievant was advised in the employment notification letter that his entry-level grade and step was determined based on "the qualifications and experience that you included in your Application for Employment (Form 1950)." It is not the practice of the Registrar's Office to use the SQS to make entry-level determinations, and there is no requirement that SQS forms be used in such determinations. The SQS is not a chronological delineation of work experience. It does not provide detailed dates of service, starting and ending salaries, references, or a complete description of jobs and duties. Instead, the SQS attempts to determine "how you have used the . . . abilities and/or knowledge," helps structure the candidate's oral examination by providing real-life examples to the examiners, and serves as part of the "competitive evaluation of applicants." While the SQS is considered relevant to the screening and examination process, it is not needed for subsequent personnel actions and is not consulted during the process of determining entry-level salary. It is customary to remove the SQS and other paperwork related to the examination process from an applicant's file once the applicant has passed the oral examination and is placed on the hiring register.

The Agency points out that grievant was advised that if he had updated information on his work experience or questioned the original determination, a salary review request must be submitted within 10 calendar days. It is not germane that he had no access to SOP 115A prior to his employment. SOPs are created to instruct Agency employees about how to conduct their work, not to provide guidance to potential new hires.



The Agency stated that grievant's request for a salary review was untimely. However, since he had filed a grievance over the setting of his entry-level salary, the focus of the investigation was to determine whether an error was made in the setting of his entry-level salary. It concluded that no consideration could be given to the detailed resume submitted with {Grievant's} grievance as the issue is whether the agency erred in making its initial salary determination based on the information before the agency at that time. Based on an analysis of grievant's Form DS-50, the agency determined that {Grievant} actually received a higher step than warranted. No reduction in salary will take place. Therefore, the Agency contends that grievant was not harmed by the initial misevaluation.

#### **IV. DISCUSSIONS AND FINDINGS**

In contesting the Department's determination of initial salary, the employee is seeking a financial benefit (*i.e.*, increased salary) which he alleges to have been denied. The issue is grievable under 22 CFR 901.18(a)(7).<sup>1</sup> Under the provisions of 22 CFR 905.1(a), the grievant has the burden of establishing, by the preponderance of the evidence, that his grievance is meritorious.

22 U.S.C. Section 3964 grants the Secretary of State discretionary authority to assign all Foreign Service personnel to "appropriate salary classes in the Foreign Service Schedule." Regulations at 3 FAM 3121.1-2 provide that:

A Foreign Service specialist career candidate is appointed at a class in the Foreign Service Schedule, and at a salary rate within the class, which the Secretariat of the Board of Examiners for the Foreign Service, taking into consideration factors including qualifications, experience, and education, shall determine to be appropriate.

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<sup>1</sup> 22 CFR 901.18(a)(7) provides: Alleged denial of an allowance, premium pay or other financial benefit to which the member claims entitlement under applicable laws or regulations.

Guidance for setting the entry grade and salary standards for Foreign Service Specialist Career Candidates is found in SOP 115A and in the particular vacancy announcement to which the applicant is responding. The Board must determine whether, based upon the broad discretion given the Department in the Foreign Service Act, implementing regulations, and published guidelines, the Department exercised informed discretion fairly in setting grievant's entry-level salary or whether it abused that discretion. FSGB Case No. 2001-03 (June 18, 2002).

3 FAM 3121.1-2 provides that the Secretariat of the Board of Examiners will take into consideration experience, among other things, in determining the salary rate. The position announcement clearly states that "Initial salaries for new employees range from the first through the fourteenth step of the FS-4 level, depending on factors such as a degree received from an accredited institution of higher education and specialized experience." The same announcement requires applicants to demonstrate their experience by submitting a SQS listing, among other things, the "role, dates, and problem solved or objective met." While the announcement states that the SQS "may be used to structure your oral examination/interview should you be invited to one," it also adds that the SQS "is an important factor in the competitive evaluation of applicants."

A reasonable applicant would not conclude from the wording of the announcement that the SQS is not consulted during the process of determining entry-level salary. The announcement states that the initial salary depends, in part, on specialized experience, and the SQS is designed to demonstrate that experience. A reasonable applicant would fairly conclude from the announcement that the initial salary grade and step would be determined by an evaluation of the entire package he was required to

submit, including the SQS. SOP 115A also does not limit the evaluation to the Application Form DS-50. It provides, in part, as follows:

As in the past, a grade will be assigned in the Evaluation Branch at the QEP stage but the grade at which the candidate is eventually appointed will be determined by a qualifications evaluation performed by the Staffing Specialists in the Registrar's Office at the time an offer is made.

Therefore, we determine based upon the Foreign Service Act, implementing regulations, and published guidelines, that the Department abused its discretion in setting grievant's entry-level salary by not considering the entire package that the grievant was required to submit, including the SQS. Grievant was correct in assuming that the agency had all the information required to make a correct judgment. The Department's position that grievant's request for a salary review was untimely because he did not request a salary review within 10 days of the employment offer is inapplicable to the grievant's situation and misplaced.<sup>2</sup>

We also sustain grievant's argument that he was not correctly advised of the salary review options. Although grievant was notified that "salary review requests must be received within 10 calendar days from the date of this letter" and that "salaries will not be reconsidered once you have entered on duty," SOP 115A provides an exception to that rule. The exception states:

Exceptions to this rule will be decided on a case-by-case basis by the Salary Review Committee for any application received not later than 30

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<sup>2</sup> Accordingly, we need not address the legal status and effect of the Department's pre-appointment and ten-day entry-level salary appeal requirement. However, as recognized by the Department in this case, the pre-employment salary appeal period has no effect on the jurisdiction of this Board where a timely grievance is filed by a member of the service over the setting of entry-level salary. The Board will no longer follow FSGB Case No. 2007-006 (June 27, 2007) and FSGB Case No. 2007-003 (September 21, 2007) where it was stated, *inter alia*, that the Board would accept jurisdiction and conclude that the Department waived its timeliness challenges where the Department elected to decide the case on the merits, despite insisting that the request was untimely. No claims or defenses will be deemed waived by being joined with one or more other claims or defenses. See Fed. R. Civ. P. 8(a)(3) and 12(b).

days after entry on duty (example of exception: Candidate received an offer of appointment a few days prior to EOD [entry on duty] date). All decisions of the Salary Review Committee are final.

Grievant was not notified that he could make application for a salary review within 30 days after entry on duty. He entered on duty on March 4, contacted AFSA about his initial salary on March 23, and filed his grievance on April 17. He did not learn of the existence of SOP 115A until it was cited in the agency's response to his grievance as one of the bases for initial salary determinations. A right to be heard is of little reality or worth if the employee does not have notice of it. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

Grievant was provided inadequate notice of his opportunity to request a salary review and the Department was responsible for failing to provide adequate information to him. FSGB Case No. 2006-024 (December 11, 2006) (Grievant relied to his detriment on inadequate notice about his promotion prospects).

It is apparent that the procedural errors found here were of such a nature that they may have been a substantial factor in the agency action with respect to the grievant. Based only on grievant's Application Form DS 50, he was credited with 11 years and 4 months of creditable experience from October 27, 1995 to March 27, 2006, the date of his application. The SQS and personal history statement {Grievant} submitted with his application consists of a description of additional work experience dating from 1976. Grievant has been potentially harmed by the procedural errors as he claims that, by the Department refusing to consider this information to assign him the correct step of his grade, he stands to lose over \$12,000 a year for the foreseeable future.

Therefore, pursuant to 22 CFR Section 905.1(c), we remand the case to the Department to consider grievant's Application DS Form 50, SQS, and personal history statement in conducting a new qualifications evaluation and salary review and for its burden to establish, by a preponderance of the evidence, that the agency would have taken the same action had the procedural errors not occurred.<sup>3</sup>

## **V. ORDER**

The Department is directed to consider grievant's Application DS Form 50, SQS, and personal history statement in conducting a new qualifications evaluation and salary review. The Department shall report to the Board on its determination within 30 days of receipt of this Order.

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<sup>3</sup> Should error ultimately be found, 3 FAM 3121.4-1 provides, "It is the policy of the Department to correct an error or prevent an injustice by providing an increase to a higher salary rate within a class pursuant to the recommendation of a duly constituted grievance board or panel or an equal employment opportunity examiner."